80-1669

Office-Supreme Court, U.S.
FILED
APR 6 1981
ALEXANDER L. STEVAS,
CLERK

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1980

FRANK E. MOSS,

Petitioner,

v.

G. ANDREW LAWRENCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DONALD B. HOLBROOK,
Counsel of record, and

D. MILES HOLMAN, of
Jones, Waldo, Holbrook &
McDonough
800 Walker Bank Building
Salt Lake City, Utah 84111
Telephone: (801) 521-3200

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Should the Court of Appeals for the Tenth Circuit be reversed for holding that:

A. A high-ranking, paid, professional political advisor and specialist to a candidate for the United States Senate was not a "public figure" for purposes of the First Amendment to the United States Constitution?

B. If not a "public figure" under the circumstances of A above, that a high-ranking, paid, professional political consultant who injected himself into a political campaign for the United States Senate to conduct polling, strategy formulation, voter targeting, volunteer organization, advertising, writing, fund raising and general campaign management was not a "public figure" for purposes of the First Amendment to the United States Constitution?

C. If not a "public figure" under the circumstances of A or B above, that a high-ranking, paid, professional campaign consultant and advisor who had extensively involved himself in a campaign for the United States Senate and who had previously held significant government and partisan political positions was not a "public figure" for purposes of the First Amendment to the United States Constitution?

D. If not a "public figure" under the circumstances of A, B, or C above, that a high rank-

ing, paid, professional political consultant and advisor was not a "public official" or "public figure" for the purposes of the First Amendment to the United States Constitution with regard to a comment made about said person during a campaign for the United States Senate in which he had voluntarily involved himself which comment reflected upon his previous significant government services?

II. Should the Court of Appeals for the Tenth Circuit be reversed for holding that a person's mere anonymity in one locale precludes that person from being a "public figure" there for purposes of the First Amendment to the United States Constitution despite his position as a paid, professional, high-level political consultant and advisor in that locale and his previous other significant and high-level governmental and political involvement elsewhere?

III. If the Court of Appeals for the Tenth Circuit properly found such a high ranking, paid, political consultant and advisor to be neither a "public official" nor a "public figure" should not this Court enunciate a new category including such persons in a status having identical significance to that of "public officials" and "public figures" for the purposes of the First Amendment to the United States Constitution?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW .. i

CITATION TO OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF CASE 2

1. Statement of Facts 3

2. Decisions Below 7

REASONS FOR GRANTING THE WRIT 9

POINT I

A FUNDAMENTAL FREEDOM IS AT ISSUE; FREEDOM OF SPEECH IN THE POLITICAL PROCESS NEEDS BREATHING SPACE 9

POINT II

THE DECISION BELOW IN THE COURT OF APPEALS FOR THE TENTH CIRCUIT CREATES A CONFLICT AMONGST THE CIRCUITS AND ERRS IN ITS DETERMINATION AS TO WHO IS A PUBLIC FIGURE 12

Page

CONCLUSION 20

APPENDICES

APPENDIX A — Decision of Court of Appeals for the Tenth Circuit, January 13, 1981 ..... A-1

APPENDIX B — Memorandum Decision of District Court, July 23, 1979, including excerpt from interrogatories attached thereto and excerpt from Statement of Points and Authorities in Support of Defendant's Motion for Summary Judgment incorporated into the decision of the District Court B-1

APPENDIX C — Summary Judgment of District Court C-1

CITATIONS

Cases

Associated Press v. Walker, 388 U.S. 130 (1967) 13, 14, 16

Buchanan v. Associated Press, 398 F. Supp. 1196 (D.D.C. 1975) 17

Buckley v. Valeo, 424 U.S. 1 (1976) 9, 10, 20

Page

Cantwell v. Connecticut,
310 U.S. 296 (1940) 9

Curtis Publishing Co. v. Butts,
388 U.S. 130 (1967) 8, 19

First National Bank v. Bellotti,
435 U.S. 765 (1978) 9

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 8

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 8

Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) .. 9, 10

New York Times v. Sullivan,
376 U.S. 254 (1964) 8, 9, 15, 19

Thompson v. Evening Star Newspaper Co.,
394 F.2d 774 (D.C. Cir. 1968),
cert. denied. 393 U.S. 884 (1968) 16

Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.
1969), *cert. denied*, 395 U.S. 922 (1969) 15

Whitney v. California, 274 U.S. 357 (1927) 11

Wolston v. Reader's Digest Assn., Inc.,
443 U.S. 157 (1979) 8

CONSTITUTION

United States Constitution,
First Amendment 2

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1980

FRANK E. MOSS,

Petitioner,

v.

G. ANDREW LAWRENCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on January 13, 1981.

CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is not yet published but is printed in Appendix "A" hereto, infra, pp. A-1-11.

The unreported Memorandum Opinion of the United States District Court for the District of Utah, Central Division, is printed in Appendix "B" hereto,

infra, pp. B-1-24; (Civil No. 78-0195 (D. Utah July 23, 1979)). The Summary Judgment entered July 23, 1979, by the District Court is printed in Appendix "C" hereto, *infra*, p. C-1.

JURISDICTION

The Judgment of the United States Court of Appeals for the Tenth Circuit was entered January 13, 1981. The jurisdiction of the District Court was based upon 28 U.S.C. § 1332. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This is a diversity civil action for defamation brought by plaintiff-respondent, a resident of the State of Virginia, against defendant-petitioner, a resident of the State of Utah, in which respondent requests $1,000,000.00 in damages for lost earnings and $5,000,000.00 in general, special and punitive damages.

1. Statement of Facts

The facts presented here are uncontroverted. They are related in detail only to illustrate the nature of the legal principles involved.

Petitioner Frank E. Moss, hereinafter "Moss" was a United States Senator from the State of Utah for eighteen years until his defeat by Orrin G. Hatch, sometimes hereinafter "Hatch," in the 1976 general election.

In August of 1976, respondent G. Andrew Lawrence, hereinafter "Lawrence," an independent political campaign consultant, was retained by the National Conservative Political Action Committee and the Conservative Victory Fund. In September of 1976, Lawrence was sent to Utah as a paid, professional politician to aid the Senate campaign of Mr. Hatch. In Utah Lawrence engaged in political polling, strategy formulation, voter targeting, volunteer organization, advertising, writing, fund raising, and general campaign management on behalf of Mr. Hatch. Further, Lawrence's duties were to consult with and advise Hatch and his campaign staff on commercials, endorsement solicitation, direct mail, voter turn out, a get-out-the-vote program, statewide organizational structure, scheduling, and candidate appearances. In general, Lawrence consulted in the overall management of the campaign. For this work, Lawrence was paid by either the American Conservative Union or the Conservative Victory Fund with some partial payment from Hatch's campaign fund. Lawrence considered himself to be a valuable "profes-

sional" political advisor. In his opinion, the expertise he added to the Hatch campaign was superior to anything Hatch already had on his staff. He was no ordinary volunteer or campaign worker. He was sent to Utah as an experienced, highly trained professional by an outside group of political operatives. Lawrence even entertained thoughts of continuing with Hatch as a high-ranking advisor in Hatch's Senate staff should Hatch be elected.

One of the issues which arose in the campaign was whether or not candidate Hatch was receiving advice and services from non-Utahns. On October 26, 1976, Moss held a press conference attended by media representatives to discuss legislation affecting the elderly. In response to an unanticipated question from a media representative asking Moss about allegations that out-of-state extremists were running the Hatch campaign or donating money, Moss named Lawrence as one of those out-of-state extremists and further described Lawrence as a former employee of the re-election campaign committee for Richard M. Nixon and Spiro Agnew and as a "bagman for Spiro Agnew", for whom Lawrence had previously worked while in government employment. When asked what was meant by "bagman" Moss replied that it meant that Lawrence "would pick up the money Spiro would get".

Lawrence had been involved in concentrated political and governmental activity, shifting freely between "public official" and "public figure" status. Beginning in the late 1960's Lawrence acted as a White House

social aide for Presidents Lyndon B. Johnson and Richard M. Nixon. After more than two years at the White House, Lawrence became Staff Assistant to Vice President Spiro Agnew and in that public position was responsible for processing and reviewing all correspondence to and from the Vice President including political and governmental mail. Much of that mail was originated and reviewed personally by Lawrence. Additionally, Lawrence was responsible for reviewing major political decisions for their impact on the correspondence and organizational operations of Mr. Agnew's office.

After two and one-half years as an official on Vice President Agnew's staff, Lawrence joined the Committee for the Re-Election of the President which was the 1972 re-election campaign committee for President Richard M. Nixon and Vice President Spiro Agnew. While with the committee Lawrence was personally involved in administration, budgeting, fund raising, including direct mail fund raising, telephone campaign activities and national convention activities. Further, Lawrence oversaw the volunteer organization, personnel operation, office management, mail room, telephone, general public correspondence, national store front and directed all administrative support activities of the Republican National Convention headquarters in Miami for the 1972 Republican National Convention which nominated candidates for President and Vice President of the United States.

It was these associations with Vice President Spiro Agnew while employed directly by the United States

government or by Mr. Agnew's national campaign committee, being either a "public official" or "public figure", that gave rise to the characterization of Lawrence made by Moss.

After the election of President Richard M. Nixon and Vice President Spiro Agnew, Lawrence left the campaign organization in December, 1972, again becoming a "public official" by accepting an appointment as Special Assistant to the Assistant Administrator of the General Service Administration, an agency of the federal government. There Lawrence was assigned to handle Congressional and public affairs, briefings, and other management related activities of the General Services Administration. Lawrence resigned from the General Services Administration in January of 1974 after he was charged with civil service irregularities by the United States Civil Service Commission which recommended removal. The disciplinary proceedings instituted by the Civil Service Commission against Lawrence were terminated upon his resignation.

Six months later, Lawrence became Vice President for Administration and Director of Community Relations for the American Freedom Train Foundation, Inc., an organization established to function in the American Bicentennial celebration. Fourteen months later, Lawrence left the American Freedom Train Foundation and once again entered federal employment (April 1975) as an Administrative Assistant to the Administrator of the Social and Economic Statistics Administration of the United States Department of Com-

merce. Two weeks after joining the Social and Economic Statistics Administration (May 1975), Lawrence resigned after newspaper articles reported the earlier charges of illegal actions against him while at the General Services Administration.

Six months prior to the alleged defamatory statement, Lawrence graduated from the Republican National Committee's Campaign Management College after undergoing an intensive course in campaign management. Lawrence also completed the National Conservative Political Action Committee Campaign Management Seminar. In June, July and August, 1976, Lawrence was retained to raise funds for a statewide constitutional referendum in Oklahoma, to raise funds at the Republican National Convention at Kansas City for Senator Buckley of New York, and to solicit direct mail fund raising contacts from members of Congress. At the Republican National Convention in the Summer of 1976, Lawrence worked in Governor Ronald Reagan's campaign to obtain the Republican nomination for President of the United States. Fresh from these experiences (September 1976) Lawrence flew to Utah to aid candidate Orrin G. Hatch, to the extent noted earlier, in his contest with incumbent Senator Frank E. Moss, the petitioner herein.

2. Decisions Below

Based upon the foregoing uncontested facts, the District Court held upon a motion for summary judgment that Lawrence was a "public figure" as contemplated by the First Amendment to the United States

Constitution as interpreted by this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and subsequent cases including *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Wolston v. Reader's Digest Assn. Inc.*, 443 U.S. 157 (1979); and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), for the purposes of Lawrence's defamation action for Moss' comments on Lawrence's association with Vice President Spiro Agnew. The District Court below wrote:

> In this case, we have a governmental and political operative who, between 1970 and 1976, swung back and forth across the line between high official government service and important partisan political activity. And whether in public service or whether involved in partisan political activity, he, by his own word, moved and turned at distances not too far removed from the hubs of great political and governmental power.
>
> When Plaintiff, in September 1976, left Washington, D.C. to go to Utah to "politic" for a candidate for the United States Senate in the capacity described by him, he could hardly leave within the District of Columbia his trappings, his indicia of a "public figure". And when he reached Utah he assumed and maintained at a significant level "an influential role in ordering society" and he was "intimately involved in the resolution of important public questions". *Butts, supra*, at 164 (Warren, C. J. concurring) [*Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967)]

See App. B-10-11.

The court determined that because of Lawrence's "public figure" status that in order to recover Lawrence

would have to prove that Moss had acted with actual malice, meaning knowing falsehood or reckless disregard for the truth.

The Court of Appeals for the Tenth Circuit reversed the determination of the District Court, declaring Lawrence to be a private individual upon the facts presented.

REASONS FOR GRANTING THE WRIT

POINT I

A FUNDAMENTAL FREEDOM IS AT ISSUE; FREEDOM OF SPEECH IN THE POLITICAL PROCESS NEEDS BREATHING SPACE.

The Freedom of Speech Clause of the First Amendment of the United States Constitution and the interpreting decisions thereon provide the broad scope of the freedom of speech we enjoy in our Constitutional form of government. *New York Times v. Sullivan*, 376 U.S. 254 (1964). Freedom of speech additionally implicitly countenances a freedom to hear thereby creating a free interchange of thought in the marketplace. At no other place is the need for the freedom to speak more necessary or more beneficial to the public than in the political arena. *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *New York Times v. Sullivan, supra; Cantwell v. Connecticut*, 310 U.S. 296 (1940). In *Buckley v. Valeo, supra* at 14-15, this Court wrote:

> In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 28 L. Ed. 2d 35, 91 S. Ct. 621 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

The political contest, therefore, becomes the showcase for freedoms of speech.

In a political campaign the candidates are on the cutting edge of political philosophy and idealogy as concepts of government, society, and order are debated. Inevitably, this public debate tends to inform the electorate. In the competitive atmosphere of an election and the campaign preceding it, each candidate must speak to and address not only his own political philosophy but also that of his opponents, not solely in an effort to win the election and hold the office, but, more fundamentally, to enable the persons who must elect him to make an informed decision on their choice for a representative. The decision of this Court in *Buckley v. Valeo, supra* at 52-53, further reads:

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of a public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known

> so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country "public discussion is a political duty," *Whitney v. California*, 274 U.S. 357, 375, 71 L. Ed. 1095, 47 S. Ct. 641 (1927) (concurring opinion), applies with special force to candidates for public office.

The electorate's informed decision must, of necessity, also include the consideration of the integrity and personality of the candidate and the influences upon him. The identity and background of the persons who actively support the candidate at the inner circle of the campaign also become relevant to determine the influences under which the candidate operates. This becomes vital when dealing with paid political professionals who are sent to a local campaign by national groups, and especially so when the person has been in and out of "public official" and "public figure" status, the comment at issue concerns that status, and indeed seeks to return to a "public official" status on the staff of the very candidate he is being paid to help.

The integrity and benefits of the political process are, at least partially, dependent upon the breathing space afforded the political process. The freedom of political choice would have diminished significance without some protection being afforded when one speaks about a candidate's paid, high-level advisors. The protection granted one who discusses "public figures" is sufficient to grant the breathing space needed.

POINT II

THE DECISION BELOW IN THE COURT OF APPEALS FOR THE TENTH CIRCUIT CREATES A CONFLICT AMONGST THE CIRCUITS AND ERRS IN ITS DETERMINATION AS TO WHO IS A PUBLIC FIGURE.

The political campaigns for major national offices such as United States Senator and United States Congressman, although conducted within the states, undertake national significance. Campaigns in the various states and congressional districts around the country exert influence on national policy. For this reason external influence is often exerted in the individual states to affect the outcome of elections to national offices. Gone is the day where home-grown candidates could conduct totally home-grown campaigns. Candidates now seek out-of-state advisors, advertising agencies, campaign contributors, consultants, managers, specialists, and others whose contact with the state where "their" candidate is waging political war may only be tangential at best. Consequently, paid tactical squads of political experts, specialists, and strategists born, raised, educated and trained throughout the United States may be drawn together and injected into a forum far from their "home" in an effort to influence the outcome of a specific election and thus impact national policies. There they often seek key positions on the staff of the candidate they support.

Lawrence was one such out-of-state political expert who injected himself into the Utah Senatorial campaign after being politically active and involved in high government positions outside of Utah for years prior to that time. Lawrence's sole purpose for coming to Utah was to influence a Utah Senatorial campaign. Lawrence understood the purpose of his coming to Utah, hoping his candidate would emerge victorious and Lawrence would again become a high public official. This Court in *Associated Press v. Walker*, 388 U.S. 130 (1967), in establishing the "public figure" privilege wrote at 155 that one is a "public figure" by:

> . . . [p]urposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy. . . .

Lawrence had participated in the Hatch campaign in political polling, strategy formulation, voter targeting, volunteer organization, advertising, writing, fund raising and general campaign management, in addition to consulting with and advising the candidate as a paid "professional". The Court of Appeals concluded that Lawrence, nonetheless, was a behind-the-scenes administrator and unless he had voluntarily caused his name or identity to come to the forefront he was not a "public figure", even though he had been in and out of "public official" and "public figure" status over previous years outside of Utah.

The Court of Appeals neglected to consider that the high-level advisors and consultants to a candidate, whether behind-the-scenes or open to the public, may have a substantial impact upon the candidate's thinking

and philosophy and, consequently, the candidate's approach to public issues. On occasion, therefore, the candidate may merely act as a proxy or conduit for the philosophy of his advisors in the resolution of important public controversies. Even though the candidate's philosophy may be similar to that of his advisor, the candidate is influenced by the advisor's views on important public issues. This Court has said that those who meet the criteria to be defined as a "public figure" are those who merely thrust their personality into the "vortex" of important public controversies. *Associated Press v. Walker*, 388 U.S. 130, 155 (1967). The thrusting of one's personality into a vortex of a controversy does not require the surfacing to public view of the person's name or identity. Some may wish to exert influence upon the ordering of society and resolution of public debate anonymously yet their influence may be just as great or sometimes greater than the one whose name and identity become widely known. Hundreds of thousands of people join political forces every year to influence the election of a relative handful of candidates. These thousands of supporters, some of whom are paid for their expertise and specialty and travel throughout the country, undertake varying degrees of responsibility in resolving the important public issue of electing our representatives and governmental administrators. The Tenth Circuit, without distinguishing the highly trained, paid, professional campaign specialist from the volunteer precinct worker, excluded from free public scrutiny a whole class of highly influential men and women whose career goals are to influence public choices. Furthermore, the Tenth Circuit failed to take into account the past political and

governmental involvement of that high-ranking campaign aide in concluding that his mere anonymity in Utah notwithstanding his political and governmental history caused him to not reach the status of a "public figure", a conclusion we assert is erroneous.

The United States Court of Appeals for the Fifth Circuit has ruled in a situation substantially similar to the one now before this Court that those persons who become actively and substantially involved in the political campaign are public figures even though they are not the candidate and their names have not been intentionally brought to the forefront by the person so becoming involved. In *Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969), the plaintiff contributed substantial material aid to a Bahama political campaign by providing transportation to specific candidates in the election. Under those circumstances, the Court of Appeals determined that the plaintiff was a "public figure" and was subject in his action to the limitations established by *New York Times v. Sullivan*, 376 U.S. 254 (1964). The Fifth Circuit Court specifically concluded at 573 that:

> . . . the constitutional privilege extends to discussions by specific individuals not associated with any government, if those individuals are involved in matters of important public concern. Such was the case of the plaintiff here. He had injected himself into an election campaign in a small foreign country in which the announced policy of the opposition to the present government was the elimination of racketeer gambling. He had supported the effort of this reform gov-

> ernment by contributing substantial material aid [transportation services], and thus lent a direct influence to the election of a national government for the country. Such activities as he engaged in and his conduct as such a participant, are the proper subject of inquiry and of public interest. It seems clear, that he, as much as General Walker in the *Walker* case [*Associated Press v. Walker*, 388 U.S. 130 (1967)], *supra*, acted in a manner that amounted to a "thrusting of his personality into the 'vortex' of an important public controversy". (Bracketed Matter Added.)

Therefore, a person found to be participating in the political campaign not as a candidate but merely in the behind-the-scenes effort of providing "substantial material aid" limited to transportation services was, in the opinion of that Court of Appeals, a "public figure".

The Court of Appeals for the District of Columbia also approached a similar matter to the one decided in the Tenth Circuit below and found the campaign aide to be a "public figure". In *Thompson v. Evening Star Newspaper Co.*, 394 F.2d 774 (D.C. Cir. 1968), *cert. denied* 393 U.S. 884 (1968), a public relations man in the District of Columbia took a prominent role in a group appealing for public support in the election of a specific slate to the local Democratic organization and was found to be a "public figure". The Court of Appeals reasoned at 776 that:

> [t]he public plainly has a vital interest not only in the calibre of candidates for political office, but in the nature of the groups or factions supporting the candidates, and the quality of candidates' spokesmen and backers are appropriate consider-

> ations to be taken into account. They "often play an influential role in ordering society".

The plaintiff in *Thompson* was an active political supporter and was, consequently, found to be a "public figure".

A District Court opinion in *Buchanan v. Associated Press*, 398 F. Supp. 1196 (D.D.C. 1975), further illustrates the conflict which the Court of Appeals' decision below creates. In *Buchanan* a former accountant to the campaign committee for the re-election of President Richard M. Nixon and Vice President Spiro Agnew brought a defamation action based on a publication related to the financial affairs of the committee. The plaintiff in that case was not the candidate nor even a close political advisor to the candidate nor was there any indication that he promoted his own name or identity. The District Court, nevertheless, found the plaintiff to have voluntarily injected himself into a matter of public controversy and was, consequently, a "public figure". The Court determined that the "complete and uninhibited reporting of all events relating to the American political process is very compelling" and, as such, those who voluntarily inject themselves into the political process become public figures at least so far as the political process is concerned. (*Id.* at 1202)

The decision of the Tenth Circuit Court of Appeals below is in direct conflict with the decision of the Fifth Circuit Court of Appeals and District Court decisions noted and in conflict in principle with the decision of the District of Columbia Circuit also noted above. Con-

sequently, the review of the presented issues by this Court would not only resolve the conflict amongst the circuits which have ruled on this issue, but would also further the beneficial effect of having some predictability on this subject which is so important to the exercise of fundamental rights and privileges.

Petitioner Moss firmly believes that the approach taken by the Fifth and District of Columbia Circuit Courts of Appeals noted above which are in conflict with the lower court herein is the approach that ought to be pursued in cases of this kind to avoid silencing vital issues by having candidates in constant legal jeopardy. The person who becomes actively involved at high levels of the political process, particularly as a paid "professional", voluntarily thrusts his personality into the vortex of important political decisions even if his name or identity fails to come into public view. Lawrence provided his political expertise to several candidates, including Mr. Hatch in his contest with Senator Moss. We are not here talking about those campaign volunteers, inherent and important to any campaign, who perform the numerous grass roots tasks of distributing flyers, block canvassing, envelope stuffing or other duties of that nature. The person who now asks for damages from Moss is one of the numerous paid, professional, high-level, but behind-the-scenes, political strategists who have graduated from those meaningful but less demanding tasks to the circle where his political advice and expertise are thrust forward and utilized. As such, they thereby achieve "public figure" status. If not a "public figure", we suggest that paid, high-ranking,

political advisors and consultants should further be classified into a new category which must prove actual malice in order to recover in a defamation action as do "public officials" and "public figures". *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

What the Court of Appeals for the Tenth Circuit has held would inhibit the discussion concerning a large class of high ranking advisors such as economic, foreign affairs, and domestic affairs advisors and consultants, even if paid professionals, who merely funnel their thoughts to their candidate for his or her later dissemination to the public. Freedom to discuss these advisors and their views is warranted, beneficial, and vital to our political process.

To our knowledge, this Court has never specifically addressed the status of non-candidate politicians such as Lawrence who do not seek the limelight but nonetheless exert influence on the resolution of important public issues. The unique combination of circumstances involving Lawrence provides the Court with a well defined opportunity to establish and settle the law in a most significant and fascinating area which sorely needs the artful guidance of the Supreme Court. Under these separate circumstances or a combination thereof this Court could determine whether the paid political advisor in various stages of involvement in the political process is a "public figure" or some other newly articulated category for the purposes of determining the applicable defamation standard.

CONCLUSION

Petitioner Frank E. Moss suggests that the Court of Appeals for the Tenth Circuit fundamentally erred in its determination as to who within the political process is a "public figure" or otherwise must show actual malice to recover in a defamation action thereby creating a conflict amongst the Circuit Courts of Appeals who have ruled otherwise and, we assert, correctly on the issues now before this Court. The Tenth Circuit's error rests not on a faulty determination of fact inasmuch as the facts are undisputed but rests upon a basic misunderstanding and misapplication of important constitutional principles in an area in which this Court has yet to rule. A rulng of this Court would establish the guidelines where none now exist whereby the important and fundamental freedoms afforded to speech are protected and fostered in the atmosphere of the political campaign where freedom of speech should have its "fullest and most urgent application", *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). Consequently, petitioner Frank E. Moss respectfully submits that a Writ of Certiorari should issue to the United States Court of Appeals for the Tenth Circuit to review the judgment rendered therein in this matter.

Respectfully submitted,

Jones, Waldo, Holbrook & McDonough
Donald B. Holbrook,
Counsel of Record
D. Miles Holman
800 Walker Bank Building
Salt Lake City, Utah 84111
Telephone: (801) 521-3200
ATTORNEYS FOR PETITIONER

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

G. ANDREW LAWRENCE,

Appellant,

v.

FRANK E. MOSS,

Appellee.

[January 13, 1981]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. C78-195)

Matthew A. Kane (Kane and Koons and Ronald C. Barker, with him on the briefs) for Appellant.

Donald B. Holbrook (D. Miles Holman and Jones, Waldo, Holbrook & McDonough, with him on the brief) for Appellee.

Before SETH, BREITENSTEIN and BARRETT, Circuit Judges.

BREITENSTEIN, Circuit Judge.

In this diversity action for defamation and slander, the district court sustained defendant's motion for summary judgment on the grounds that the plaintiff was a public figure, who could recover only on a showing of actual malice, and that the record did not present any question of fact on the existence of actual malice. We reverse and remand for trial.

The case was filed in the United States District Court for the District of Columbia and transferred to the District of Utah pursuant to 28 U.S.C. § 1406(a). A United States district judge from the District of New Mexico was designated to handle the case. The incidents giving rise to plaintiff's slander claim arose during the 1976 campaign for the election of a United States Senator from Utah.

The incumbent, defendant-appellee Frank E. Moss, was opposed by Orrin G. Hatch, the eventual winner. Plaintiff-appellant, W. [sic] Andrew Lawrence, assisted the Hatch campaign in various capacities during September and October, 1976. The slander is based on an October 26, 1976, interchange between defendant Moss and an unidentified reporter at a Utah press conference. The undisputed record shows the following:

> "*Question*: 'Mr. Richards said that you allege that Coors and other out-of-state extremists are running Hatch's campaign. Do you think they are running the campaign, or is it just that they have donated $5,000 bucks?'
>
> *Mr. Moss*: 'I think they have done both. They put in the money to begin with to get it started and they set the tone of what the campaign would be. There are a lot of advisers. Besides Mr. Coors, there's Ernest Wilkinson and Leon Skousen who are local people that are advising Mr. Hatch, but a young man named Andy Lawrence has been here. Mr. Hatch, in a joint appearance that we had, admitted that Andy Lawrence had been here as a consultant. Well, I know about Andy Lawrence. He was the bag man for Spiro Agnew. And he worked for

> CREEP. And he was sent out here by these right wing organizations to assist in this campaign. Now Mr. Hatch said Andy Lawrence is now gone. And I have to believe him. I haven't seen him. But he was here and he did work for a considerable period of time here.'
>
> *Question*: 'What do you mean when you say he was a "bag man" for Spiro Agnew?'
>
> *Mr. Moss*: '(He) picked up the money Spiro would get.'"

Plaintiff claims that the reference to "bag man for Spiro Agnew" is slanderous per se because it implies participation in bribery or receipt of illegal campaign contributions. A plaintiff who is a public figure must prove "actual malice" to recover for defamation. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, and its progeny discussed later. The first question is whether plaintiff is a public figure. The grant of summary judgment was based on the complaint, answers to interrogatories, responses to requests for admissions and for production of documents and depositions. The facts pertaining to the activities of the plaintiff are not contested.

In his early youth plaintiff was interested in politics. From January, 1970, through May, 1972, he served on the staff of Vice-President Agnew and participated in the "decision making process." In June, 1972, he joined the Committee for the Reelection of the President (CREEP) as the deputy director of administration with oversight of various political groups. In December, 1972, he was employed as "special assistant to the

Assistant Administrator of the General Services Administration" in Washington, D.C. Charges of improper conduct were brought against him and dropped after his January 25, 1974, resignation.

In April, 1975, plaintiff was employed by the United States Department of Commerce, and was terminated the next month after publication of an article in the *Washington Post* which called attention to his background, his connection with General Services, and his new employment. In May, 1976, plaintiff took courses in campaign management sponsored by the Republican National Committee and by the National Conservative Political Action Committee. After completion of the courses he raised funds in several states for various purposes. In August, 1976, he became an independent political campaign consultant and was retained by the National Conservative Political Action Committee, the Hatch for Senate Committee, and the Conservative Victory Fund.

Because the events pertinent to this lawsuit all occurred in Utah, plaintiff's status in Utah is of prime importance. Before the 1976 election campaign, plaintiff had no Utah connection. He came to Utah in September, 1976, and from then until his October departure he assisted the Hatch campaign as a private consultant in political polling, strategy, voter targeting, volunteer organization, advertising, writing, fund raising and general campaign management.

New York Times v. Sullivan, supra, protected the news reporting media against liability to public officials

in the absence of actual malice. Plaintiff here was not a public official. *New York Times* protection was extended to public figures by *Curtis Publishing Co. v. Butts*, 388 U.S. 130, decided together with *Associated Press v. Walker*. Butts, a well known and respected football coach, was subject to the usual publicity arising from the popular interest in the sport. Id. at 136. Walker had thrust himself into the limelight by organizing opposition to federal intervention in school integration and by statements on radio and television and in press conferences. *Id.* 140-141, 159. Both Butts and Walker were held to be public figures.

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, considered a suit by a distributor of nudist magazines against various news media. The eight judges participating in the decision expressed their views in five separate opinions, none of which commanded more than three votes. The plurality opinion of Justice Brennan concluded, *Id.* at 44, that "all discussion and communication involving matters of public or general concern" were protected by the *New York Times* rule.

In *Gertz v. Welch*, 418 U.S. 323, 351-352, the plaintiff was held not to be a public figure notwithstanding his authorship of legal books and articles, his activities in professional and civic organizations, and his role as plaintiff's attorney in a well publicized lawsuit against a police officer. The Court declined to follow the *Rosenbloom* extension of *New York Times* and said, *Id.* at 343, "the state interest in compensating injury to the reputation of private individuals requires that a

different rule should obtain with respect to them." The Court summarized its decision thus, *Id.* at 347:

> "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard for a publisher or broadcaster of defamatory falsehood injurious to a private individual."

Relying on *Gertz*, the Court in *Tme, Inc. v. Firestone*, 424 U.S. 448, 453-455, held that the plaintiff was not a public figure because she did not occupy a role of special prominence and had not thrust herself into the forefront of public controversy to influence the resolution of issues.

Hutchinson v. Proxmire, 443 U.S. 111, reversed a lower court decision that a scientist who had published extensively and received public grants for research projects was a public figure. The Court held that the essential ingredient of inviting public attention or comment was missing. The Court pointed out that the plaintiff had not thrust himself or his views into public controversy to influence others and had not assumed public prominence in the debate over the public funding of his projects.

Wolston v. Reader's Digest Ass'n., Inc., 443 U.S. 157, was a libel suit against the publisher of a book which identified the plaintiff as a Soviet agent. Relying on *Gertz*, the Court held that the plaintiff was not a public figure. *Id.* at 167. In so doing, the Court expressly rejected, *Id.*, the *Rosenbloom* doctrine "that the *New York Times* standard should extend to defam-

atory falsehoods relating to private persons if the statements involved matters of public or general concern."

In the case at bar several sources brought the attention of Moss to the Utah activities of the plaintiff. In response to a newsman's question, Hatch acknowledged participation of plaintiff in the campaign. The expense reports of Hatch showed payments to plaintiff. Russ Hemingway, a Director of the National Committee for an Effective Congress, informed Moss of plaintiff's involvement with GSA, Agnew, and CREEP. Moss had read the *Washington Star* article referring to plaintiff. Mary Jane Due, a Moss employee upon whom Moss relied for information and advice, inquired of Hal Wolfe, a Washington, D.C. representative of the National Committee for an Effective Congress and was told that plaintiff was an "Agnew bag man," and had been a consultant and fund raiser for right-wing committees. Ms. Due relayed the information to Moss.

Plaintiff's activities were in the background and concerned with administrative organization. He did not thrust himself into public prominence in Utah. So far as the record shows, he made no speeches and no radio or television appearances and did not write for public consumption. If he was a public figure, so are all those who participate inconspicuously in political action designed to influence an election.

Plaintiff is a private individual who claims that he was defamed by another private indivdual. The First Amendment rights of a private individual can rise no

higher than the rights of the news media considered in the *New York Times* line of cases. *Wolston* says, 443 U.S. at 167-168, that

> "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. * * * * A libel defendant must show more than mere news-worthiness to justify application of the demanding burden of *New York Times.*"

The participation of plaintiff in the Hatch campaign may have made him newsworthy but did not transform him into a public figure. The status of the individual claiming to be defamed is the controlling factor, not the nebulous interest of the public in a matter with which he is inconspicuously involved. See *Littlefield v. Fort Dodge Messenger*, 8 Cir., 614 F.2d 581, 583-584. On the record presented, plaintiff was not a public figure at the time of the alleged defamatory statement.

Gertz recognized the state interest in compensating injury to the reputation of a private individual. 418 U.S. 347-348. Following *Gertz*, we held in *Dixson v. Newsweek, Inc.*, 10 Cir., 562 F.2d 626, 629, that Colorado law controlled in a libel action brought by a private individual. Accordingly, Utah law controls in this case. The alleged defamation occurred in Utah and related to Utah events.

A pertinent Utah decision is *Ogden Bus Lines v. KSL, Inc.*, Utah, 551 P.2d 222, a libel and slander action by a private individual and private companies

against a broadcaster's statements relating to a matter of public interest. In denying recovery the court reviewed pertinent Utah decisions and quoted the following rule with approval. *Id.* at 224:

> "It is firmly established that matters of public interest and concern are legitimate subjects of fair comment and criticism, not only in newspapers, and in radio and television broadcasts, but by members of the public generally and such comments and criticisms are not actionable, however severe in their terms, unless they are made maliciously . . . ."

"Maliciously" was not used in the sense of *New York Times* because the court said that as no public official or candidate was involved "actual malice need not be shown" in a case relating to a matter of public concern. *Id.* at 225.

The court quoted with approval, *Id.* at 226, the statement in *Direct Import Buyers Association v. KSL, Inc.*, Utah, 538 P.2d 1040, 1042, that:

> "The malice which plaintiff must show in order to overcome a conditional privilege is simply an improper motive such as a desire to do harm or that the defendant did not honestly believe his statements to be true or that the publication was excessive."

Plaintiff argues that this Utah rule conflicts with the *Gertz* rejection of *Rosenbloom.* See *Gertz, supra,* 418 U.S. at 343, and *Wolston, supra,* 443 U.S. at 167. *Gertz* permits, 418 U.S. at 347, each state to fix its own standard of liability for defamation in a suit between

individuals so long as it does not impose liability without fault. Utah has abridged no right given by the federal Constitution but, in the area of defamation, has chosen to protect speech related to matters of general or public concern. The choice does not offend the federal Constitution.

In granting defendant's motion for a summary judgment, the trial court referred to "the absence of any evidence in this case which would create a genuine issue of material fact on the question of 'actual malice.'" The ruling is consistent with its decision that plaintiff was a public figure. Our rejection of that decision impels consideration of the propriety of a summary judgment.

In review of the grant of the defense motion for summary judgment, "we must construe the facts in a way most favorable to the nonmovant [the plaintiff]." *Buell Cabinet Company, Inc. v. Sudduth*, 10 Cir., 608 F.2d 431, 433. Intent is an intangible factor best left for determination of the fact-finder after a full trial. Id.

Moss said at the press conference that plaintiff was a "bag man for Spiro Agnew." The record contains no claim by the defense that the statement was true or a proper expression of opinion. The question then under the Utah decisions in *Import Buyers*, 538 P.2d at 1042, and *Ogden Bus Lines*, 551 P.2d at 224-226 is whether the statement was made with an improper intent to do harm, or with knowledge that the statement was false, or with reckless disregard for whether it was true or not. Resolution of these issues entails the drawing of factual inferences, a function of the fact finder.

The suggestion has been made that libel and slander cases are excepted from the general rule that summary judgment is improper when intent is an issue. The reason given is that such cases threaten the free exercise of the rights of speech and press. See Wright and Miller, *Federal Practice and Procedure: Civil*, § 2730, pp. 590-592.

Hutchinson, supra, 433 U.S. at 120, n. 9, recognized that malice calls in question a defendant's state of mind and does not lend itself readily to summary judgment. The propriety of summary judgment was not before the Court in that case. It may be that in some cases brought against a member of the news media summary judgment is proper as a screening device to prevent unnecessary harassment. The instant case is not of that nature.

In *Ogden Bus Lines, supra,* the Utah court upheld a summary judgment in a news media suit when the record showed the truth of one statement and the court held that the other challenged statement was legitimate editorial comment. Such is not the case here. On the record presented the grant of summary judgment was improper.

Reversed and remanded for trial on the merits.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Civil No. C 78-195

G. ANDREW LAWRENCE,

Plaintiff,

v.

FRANK E. MOSS,

Defendant.

[July 23, 1979]

MEMORANDUM DECISION

The Motion for Summary Judgment filed by Defendant on November 13, 1978, will be granted.

I have decided to rule as a matter of law that:

1. The Plaintiff is a "public figure" as this conceptualization was conceived, has developed and has been refined in the following United States Supreme Court cases:

a) *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967);

b) *Associated Press v. Walker,* 388 U.S. 130 (1967);

c) *St. Amant v. Thompson,* 390 U.S. 727 (1968);

d) *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971);

e) *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974);

f) *Hutchinson v. Proxmire*, No. 78-680, decided June 26, 1979;

g) *Wolston v. Reader's Digest Association, Inc.*, No. 78-5414, decided June 26, 1979.

Therefore, before Plaintiff could recover in this case, it would be his burden to show that Defendant made the remark complained of with "actual malice", i.e.:

a) that the Defendant knew the statement he made was false, or

b) that Defendant made the statement with reckless disregard as to whether it was true or false.

2. The statement of which Plaintiff complains related to a matter of "public or general concern" under the law of defamation in the State of Utah. Therefore, before Plaintiff could recover in this case, it would be his burden to show that Defendant made the remark complained of with "actual malice", i.e.:

a) that the Defendant knew the statement he made was false, or

b) that Defendant made the statement with reckless disregard as to whether it was true or false.

3. In this case, there does not exist evidence from

which a jury could determine that Defendant made the statement of which Plaintiff complains with "actual malice", i.e.:

a) that the Defendant knew the statement he made was false, or

b) that Defendant made the statement with reckless disregard as to whether it was true or false.

Therefore, recovery to Plaintiff in this case is barred by the First Amendment to the United States Constitution *and* the law of the State of Utah.

New York Times v. Sullivan, 376 U.S. 254 (1964) established that:

> ". . . the constitutional guarantees (of freedom of speech and press) require . . . a federal rule that prohibits a *public official* from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — *that is, with knowledge that it was false or with reckless disregard of whether* it was true or not." (Parenthesis and emphasis mine.)

Butts, supra, and *Walker, supra*, extended *New York Times, supra, to "public figures"*. Mr. Justice Warren, announcing in his concurring opinion the reasoning accepted by a majority of the Court, observed:

> "In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, com-

> mittees, commissions, corporations and associations, some only loosely connected with the government. *This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office are nevertheless intimately involved in the resolution of important public questions* or, by reason of their fame, shape events in areas of concern to society at large." (emphasis mine)

Gertz, supra, rested the proposition that the First Amendment constitutional protection requiring a showing of "actual malice" extends only to situations where the defamatory falsehood is made in relation to "public officials" or "public figures". Before *Gertz*, a plurality of the United States Supreme Court, in *Rosenbloom, supra,* had concluded that the constitutional protection should extend to defamatory comment relating to private persons if the comment related to "matters of genral or public interest."

However, while the First Amendment protection requiring a showing of "actual malice" extends only to cases involving "public officials" and "public figures", the "actual malice" standard is, in my opinion, applicable in the State of Utah where the defamatory falsehood relates to a private person but the statement relates to a matter which "is of public or general concern."

Gertz, in 1974, specifically held that so long as liability without fault was not imposed, the individual states could adopt standards of liability for publication of defamatory falsehood. The Supreme Court, on this line, recognized that the First Amendment did not pro-

hibit the states from permitting those defamed recovery in instances where they were not "public officials" or "public figures" and in certain proscribed circumstances. However, in 1976, the Supreme Court of Utah marched back to *Rosenbloom* and not on the trail cleared in *Gertz.*

In *Ogden Bus Lines v. KSL, Inc.*, 551 P.2d 222, the Supreme Court of Utah in *dicta* indicated its approval of the "actual malice" standard where matters of "public or general concern" were involved although the defamatory statement related to a person who was not a "public official" or a "public figure". The Supreme Court of Utah quoted with approval the following from *Walker v. Colorado Springs Sun, Inc.*, 538 P.2d 540 (Colo. 1975):

> "We hold that, when a defamatory statement has been published concerning one who is not a public official or a public figure, *but the matter involved is of public or general concern, the publisher of the statement will be liable to the person defamed if, and only if, he knew the statement to be false or made the statement with reckless disregard for whether it was true or not.*" (Emphasis mine)

Ogden Bus Lines, supra, was decided by the Supreme Court of Utah two years after the United States Supreme Court decided *Gertz.* This is persuasive that the Supreme Court of Utah chose the *Rosenbloom* approach rather than that embraced in *Gertz.*

Therefore, in this case, "actual malice" on the part of Defendant must be shown by Plaintiff because:

a) Plaintiff is a "public figure", and

b) the comment by Defendant related to a matter of "public or general concern".

THE PLAINTIFF AS A "PUBLIC FIGURE"

Some of the most eloquent testimony attesting the "public figure" status of Plaintiff comes from Plaintiff himself.

Plaintiff's experience and background as a political operative and his exposure to public political activity from the time he was eleven (11) years old to the time he became "an independent political campaign consultant" in August 1976 as best evidenced by his answers to Interrogatories 2 and 3, which answers were filed in this case on September 29, 1978. A copy of these answers is attached to this Memorandum Decision. I have underlined and double-underlined statements of the Plaintiff which I believe establish him as a "public figure".

The Vice President whom Plaintiff served from January 1970 through May 1972 was Mr. Spiro Agnew. It was Mr. Agnew's "political and governmental mail" which was frequently "originated" by Plaintiff. "Major political decisions" of his employer were reviewed by Plaintiff for "impact" and Plaintiff was "often a part" of the "decision-making process" in Mr. Agnew's office.

In June 1972, Plaintiff joined the Committee for the Re-Election of the President (CREEP) as Deputy Director of Administration. In his position, Plaintiff had

"oversight" responsibility over "the volunteer organization, personnel operation, office management, mail-room, telephone, general public correspondence, national store front" together with "all administrative support activities of the National Convention Headquarters Hotel in Miami". The national convention referred to was the one which nominated Mr. Richard Nixon as a candidate for the presidency of the United States in the election of 1972.

On termination from CREEP in December 1972, he became employed as a "special assistant to the Assistant Administrator of the General Services Administration" in Washington, D.C. His responsibilities included "assignments in Congressional and public affairs, briefings, and other management-related activities".

Termination from GSA in January 1974 resulted after the following: On January 7, 1974, Plaintiff was informed by letter from Mr. Bernard Rosen, Executive Director, United States Civil Service Commission, that he, Rosen, proposed recommending to the Civil Service Commission that Plaintiff be removed from federal employment for the reason that:

> "During the period from March 1973 to July 1973, while serving as special assistant to the assistant administrator, GSA, you conducted yourself in such a manner as to cause GSA personnel officials unlawfully to obtain employment with GSA for specially referred candidates. Specifically: (and here follow recitation of 6 cases where plaintiff allegedly acted improperly).

Rosen charged Plaintiff with being:

> ". . . closely involved in the day-to-day operation of a special referral system that operated outside regular personnel channels in GSA."
>
> (above two quotations from letter, January 7, 1974, Bernard Rosen to Plaintiff. This letter is admitted in Answer to Interrogatory 54, which answers were filed January 8, 1979. Copy of letter is found in Exhibit "B" to Defendant's Second Set of Requests to Admit filed November 27, 1978.)

On February 11, 1974, Mr. Rosen advised Mr. Arthur F. Sampson, Administrator, General Services Administration, Washington, D.C., that Plaintiff had resigned as of January 25, 1974, and, therefore, disciplinary proceedings initiated by January 7, 1974, letter were terminated.

In April 1975, Plaintiff became employed by the United States Department of Commerce at Suitland, Maryland. (Answer to Interrogatory No. 3 filed September 27, 1978.)

In connection with this employment, the *Washington Star*, under a headline reading:

AIDE UNDER FIRE SLIPPED UNNOTICED INTO ANOTHER KEY POST

related the prior background and employment and termination of Plaintiff with GSA as well as his new employment. The first paragraph of that article reads:

> "A former Nixon re-election committee staff member, who resigned from one federal agency

> after being charged with violating Civil Service Laws, was given a sensitive job at another agency last month without the knowldge of the U. S. Civil Service Commission."

(Exhibit "A", attached to Affidavit of Frank Moss, filed November 13, 1978.)

Plaintiff's employment with the United States Department of Commerce was terminated in May 1975. (Plaintiff's Answer to Interrogatory No. 3.)

In May of 1976 Plaintiff completed a course in campaign management sponsored by the Republican National Committee at its "Campaign Management College". Also, in the same month, he completed a course sponsored by the National Conservative Political Action Committee. In the months of June, July and August 1976, he raised funds for a constitutional referendum in Oklahoma. He also raised funds at the Republican National Convention at Kansas City for Senator Jim Buckley of New York and also worked for Governor Ronald Reagan's campaign at the same National Convention.

In August of 1976 the Plaintiff became an independent political campaign consultant. He was retained by the National Conservative Political Action Committee, the Hatch for Senate Committee and the Conservative Victory Fund. (Plaintiff's Answer to Interrogatory No. 3.)

The above was the experience, the background, the reputation in political and governmental affairs which

Plaintiff brought to Utah in September 1976. This was the baggage which accompanied Plaintiff to Utah when he came to assist and consult in the political campaign of Orrin Hatch. And he came to Utah to engage in "political polling, strategy, voter targeting, volunteer organization, advertising, writing, fund raising and general campaign management." (Plaintiff's Answer to Interrogatory No. 3.)

In his very words his expertise in the campaign of Orrin Hatch was "far and away superior to anything they already had". He considered himself a valuable "professional" political advisor. (Plaintiff's deposition, p. 56)

Gertz teaches that it is not absolutely necessary to purposefully seek or suffer great renown or great notoriety in order to occupy "public figure" status in the law of defamation. This station, this distinction or, depending on perspective, this predicament can be gained although one would consciously wish that the cup might quietly pass to others.

In this case, we have a governmental and political operative who, between 1970 and 1976, swung back and forth across the line between high official government service and important partisan political activity. And whether in public service or whether involved in partisan political activity, he, by his own word, moved and turned at distances not too far removed from the hubs of great political and governmental power.

When Plaintiff, in September 1976, left Washington, D.C. to go to Utah to "politic" for a candidate for the United States Senate in the capacity described by him, he could hardly leave within the District of Columbia his trappings, his indicia of a "public figure". And when he reached Utah he assumed and maintained at a significant level "an influential role in ordering society" and he was "intimately involved in the resolution of important public questions". *Butts, supra,* at 164 (Warren, C. J. concurring). In September and October 1976, one of the steaming controversies in Utah was the senatorial race in which Orrin Hatch was challenging then Senator Frank Moss, the Defendant in this case. Plaintiff worked at the "forefront of (this particular controversy) in order to influence the resolution of the issues involved." *Gertz, supra,* at 345 (Powell, J.)

THE PLAINTIFF IN RELATION TO A MATTER OF "PUBLIC OR GENERAL CONCERN"

As pointed out earlier, it is my opinion that in the State of Utah, unless "actual malice" is shown, a person claiming to have been defamed cannot recover because of a defamatory statement which is related to a matter of "public or general concern" even if claimant is a private person as distinguished from a "public person" or "public official".

In Defendant Frank Moss' campaign for re-election to the United States Senate in November 1976, one of the campaign issues was whether his opponent,

Orrin Hatch, was receiving advice and services from non-residents of the State of Utah. Defendant had learned from a statement made by Orrin Hatch on public television that Plaintiff had been helping in Hatch's election campaign and that Plaintiff was formerly on Spiro Agnew's staff. Defendant had previously seen other evidence that, indeed, Plaintiff had been working in the Hatch Campaign in Utah. (Affidavit of Frank Moss filed November 13, 1978)

In this context, the Plaintiff himself was an issue in the campaign. He was, indeed, the subject or matter of "public or general concern". Thus, when, on October 26, 1976, the Defendant was asked by a newspaper reporter about "out-of-state extremists" running Hatch's campaign, the remark he made about Plaintiff was one relating to the subject about which there was "public or general concern".

AS TO WHETHER A GENUINE ISSUE OF MATERIAL FACT EXISTS ON "ACTUAL MALICE"

I accept counsel for Defendant's position and authorities under Point IV, Sub-Point 3, page 16, of his Statement of Points and Authorities in Support of Defendant's Motion for Summary Judgment as a fully adequate statement as to the absence of any evidence in this case which would create a genuine issue of material fact on the question of "actual malice".

Santiago E. Campos
United States District Judge

[ATTACHMENT TO MEMORANDUM DECISION OF DISTRICT COURT]
(Underscoring and Emphasis Supplied by District Court)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. C-78-195

G. ANDREW LAWRENCE
Plaintiff,

v.

FRANK E. MOSS
Defendant.

ANSWERS OF PLAINTIFF TO DEFENDANT'S INTERROGATORIES

Interrogatory No. 1.

Question: Identify the plaintiff.

Answer: Gayle Andrew Lawrence; home address, 6334 Olde Towne Court, Alexandria, Virginia 22307; business address, 2030 North 16th Street, Arlington, Virginia 22201; presently employed by Thomson McKinnon Securities, Inc., as a stockbroker selling securities.

Interrogatory No. 2.

Question: State the factual basis of plaintiff's claim in Paragraph 2 of plaintiff's Amended Complaint that plaintiff is qualified by training and experience

(a) "to manage political campaigns;"

(b) "assist and advise candidates for, and encumbents of political offices;" and,

(c) "raise funds on behalf of political candidates."

Answer: Since 1957, while a resident of New Orleans, Louisiana, plaintiff has been active in partisan and non-partisan political activities. At age 11, plaintiff was active in literature distribution for a city council candidate of the Democratic party in New Orleans, Louisiana; in 1958 plaintiff worked for Democratic Ross Barnett v. J. P. Coleman in the Mississippi Governor's campaign as a "poster hanger" covering most of the Gulf Coast of Mississippi. A year later, plaintiff was active for a former mayor of New Orleans in his efforts to become Governor of Louisiana; plaintiff distributed campaign literature door-to-door. [All underscoring herein, including double underscoring, supplied by District Court.]

During high school and college plaintiff was active in Key Club high school yearbook and other campus organizations and activities to raise monies in support of organizational programs. The activities ranged from car washes and picnics to various types of contests (ice cream eating) and direct appeals for funds.

While serving both President Johnson and President Nixon, plaintiff was a White House social aide and served as group secretary for over one year. One of the responsibilities was an annual fund raising outing

to secure monies for group programs and activities. Two highly successful poolside barbeques raised substantial dollars.

From January, 1970 through May, 1972, plaintiff was employed by the Office of the Vice President of the United States, the second highest political office in this country. As Staff Assistant to the Vice President responsible for correspondence, all mail, incoming and outgoing, was processed and reviewed within plaintiff's staff responsibility. Frequently, political and governmental mail was originated and reviewed personally by plaintiff. Major political decisions were reviewed for their impact on the correspondence and organizational operations. Plaintiff had personal knowledge of the decision-making process and was often a part of that process.

During the 1972 Presidential campaign, plaintiff was Deputy Director of Administration for the Committee for the Re-election of the President. From this position, plaintiff had extensive exposure to the political process and the vital elements of a political campaign. Plaintiff was personally involved in administration, budget, fund-raising (working directly with the people doing the direct mail fund-raising), telephone campaign activities and National Convention activities.

In 1974 and 1975 plaintiff was employed as Vice

President for Administration and Director of Community Relations for the American Freedom Train Foundation, Inc., Baileys' Crossroads, Virginia, doing planning, managerial and promotional work for a traveling Bicentennial exhibit.

Plaintiff was graduated from the Republican National Committee's "Campaign Management College" on May 28, 1976 (Plaintiff was a campaign staff director for a five-man team directing a hypothetical Congressional campaign). This was a six day, round-the-clock live-in intensive course in campaign management. Also in May, 1976, plaintiff completed the NCPAC Campaign Management Seminar, a three-day course given by the National Conservative Political Action Committee, Mr. John T. Dolan, director, 1500 Wilson Boulevard, Arlington, Virginia. During June, July and August, 1976, plaintiff was retained by Civic Development Group, headed by Brad O'Leary, to raise funds for a statewide constitutional referendum in Oklahoma, to raise funds at the Republican National Convention in Kansas City for Senator Jim Buckley of New York, and to solicit other direct mail fund-raising contracts from members of Congress. Also in August, plaintiff worked for Governor Reagan's campaign during the National Convention in Kansas City.

All of the above preceded plaintiff's involvement in the 1976 Utah Senatorial campaign.

Interrogatory No. 3.

Question: Identify each and every employer of plaintiff since January 1, 1965, and with regard to each such employment identify the work done or services performed.

Answer: January 1, 1965, plaintiff was a management student, University of Southwestern Louisiana, Lafayette, Louisiana. Was graduated in June, 1966. July, 1966, plaintiff was employed by the New Orleans Recreation Department, City Hall, New Orleans, Louisiana, as a summer day camp director for school children ages 6-12. Directed the daily activities of over 200 children. Completed in August, 1966.

September, 1966, plaintiff was employed by the Orleans Parish Public Schools, New Orleans, Louisiana, as a long-term substitute school teach. Taught 7th and 9th boys physical education. Completed in December, 1966. January, 1967, plaintiff entered the U.S. Army as a second lieutenant, being promoted to the rank of captain during his three year tour. After nine weeks of basic officer training at Fort Sam Houston, San Antonio, Texas, plaintiff was assigned to Ft. Meade, Maryland for one month, then was assigned to the U.S. Army, Office Surgeon General, Field Activities Unit, Washington, D.C. Primary duties included data processing — computer management responsibilities. Additional duty as a White House military social aide, working for two Presidents, to ensure well organized, successful gatherings in the White House and other locations. Completed in January, 1970.

In January, 1970, plaintiff joined the Office of the Vice President, the White House, Washington, D.C. as the staff assistant for correspondence. Plaintiff reported to the Assistant Chief of Staff for Administration and was responsible for a staff of sixteen professionals processing all correspondence addressed to the Vice President and the members of his staff. Completed in June, 1972.

June, 1972, plaintiff joined the staff of the Committee for the Re-election of the President (now defunct) in Washington, D.C. as the Deputy Director of Administration. Duties included oversight of the volunteer organization, personnel operation, office management, mail-room, telephone, general public correspondence, national store front and all administrative support activities of the National Convention headquarters hotel in Miami. Also had supervisory and operational responsibility for seven telephone banks in Los Angeles, California. Completed in December, 1972. In January, 1973, plaintiff became a special assistant to the Assistant Administrator of the General Services Administration in Washington, D.C. Duties included assignments in Congressional and public affairs, briefings, and other management related activities of the office. Completed in January, 1974.

July, 1974, plaintiff was employed by the American Freedom Train Foundation, Inc. of Baileys' Crossroads, Virginia (now defunct). This organization was an educational foundation organized to operate during the

U.S. Bicentennial. Plaintiff served the dual role as Vice President for Administration and Director of Community Relations. Responsibilities covered all office management functions and organizational contact with over eighty display cities across America. Completed March, 1975.

April, 1975, plaintiff was employed as Administrative Assistant to the Administrator of the Social and Economics Statistics Administration, U.S. Department of Commerce, Suitland, Maryland. Duties included administrative responsibilities of all kinds. Completed in May, 1975.

February, 1976, plaintiff was employed by Eugene Simpson & Brothers, Inc., 300 North Lee Street, Alexandria. Duties covered a wide range of construction details. Completed in May, 1976.

June, 1976, plaintiff was employed by Civil Development Group, Inc. of Nashville, Tennessee, as Vice President of Regional Marketing, (now defunct). Duties included political fund-raising for a constitutional referendum in Oklahoma; fund raising for Jim Buckley of New York. Direct mail and personal solicitation techniques were developed and implemented. Was responsible for marketing the corporate services in Washington, D.C. Completed in August, 1976.

August, 1976, plaintiff became an independent political campaign consultant and was retained by the National Conservative Political Action Committee, the

Hatch for Senate Committee and the Conservative Victory Fund. Plaintiff's services covered political polling, strategy, voter targeting, volunteer organization, advertising, writing, fund raising and general campaign management. Activities were completed in November, 1976.

January, 1977, plaintiff became associated with Thomson McKinnon Securities, Inc., member firm of the New York and other Stock Exchanges. Duties have included the sale of a full range of marketable investment opportunities.

[EXCERPT FROM STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT INCORPORATED INTO THE MEMORANDUM DECISION OF THE DISTRICT COURT AT B-12.]

A showing of "actual malice" must be made as an element, among others, of plaintiff's case in order to fix liability for defamation. "Actual malice" exceeds simple negligence. As such, defendant cannot be found liable to plaintiff on negligence or any mere failure to act as a reasonable man under the circumstances. The United States Supreme Court has written regarding the reckless disregard for the truth portion of the "actual malice" standard:

> . . . reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

In *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), the Supreme Court further said that:

> . . . only those false statements made with a high degree of awareness of their probable falsity . . . may be the subject of either civil or criminal sanctions.

No public figure plaintiff or plaintiff who is involved in matters of public or general concern can recover in a

defamation action without at least meeting that high standard.

Defendant, as did others, understood the term "bagman" to mean a person authorized to receive contributions for a person running for office. This use of the term was common in political circumstances by those involved in the political process. With that as a background, defendant had learned various items about plaintiff from newspaper articles, campaign reports, a director of the Committee for an Effective Congress, and campaign aides. All that source material caused defendant to understand prior to the making of the statements of which plaintiff complains: that plaintiff had been employed as a staffman for Spiro Agnew and the Committee to Re-elect the President; that plaintiff had been a fund raiser and paid political operative for right-wing committees; that plaintiff had been employed in the Hatch for Senate campaign; and that plaintiff had received some adverse publicity regarding plaintiff's former employment with the General Services Administration and the Social and Economic Statistics Administration. And most importantly, one of defendant's close aides upon whom defendant relied for information and advice inquired of the Washington, D.C., director of the Committee for an Effective Congress, a reputable political action group, regarding plaintiff and was told by that director that plaintiff was an "Agnew bagman" in those very words. Defendant's aide relayed that information, using the words "Agnew bagman", to defendant prior to October 26, 1976, the date upon

which the statements concerning plaintiff were made by defendant.

Defendant's statements were made during a busy campaign at a press conference at the questioning of a pressman just moments earlier. The pressman presumably wanted his answer then, not later. Defendant had heard that plaintiff was an "Agnew bagman" from a trusted aide, and, along with the other findings defendant had accrued, had merely relayed that information to the press without further inquiry. Defendant need not have investigated further to verify his facts. The United States Supreme Court has concisely pointed out in *St. Amant v. Thompson, supra,* that failure to investigate does not show "actual malice". In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), the United States Supreme Court wrote at 332:

> . . . that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather the publisher must act with a "'high degree of awareness of . . . probable falsity.'"

Without more, any claim that plaintiff may have that defendant failed to adequately investigate is insufficient evidence that defendant acted with "actual malice".

Senators and other candidates for office must rely on aides and assistants for the gathering of information. The burden of being a representative would be too great to bear and his tenure ineffective if he had to conduct all his own investigations and fact finding efforts. Defendant merely relied on one upon whom he had come

to rely in the past. As such, defendant heard the phrase "Agnew bagman" as describing plaintiff prior to October 26, 1976, from a person to whom defendant looked for information and advice. Surely, relying upon a trusted aide does not demonstrate a high degree of awareness of the probable falsity of the statement as required by the "actual malice" standards. Defendant's statements were not fabricated by him but were a result of previous conversations and consultations with his aides. From what defendant had presented to him by his aides his statements were totally and completely reasonable.

The finding of "actual malice" must be made with "clear and convincing" proof. *New York Times v. Sullivan, supra,* at 285-286; *Gertz v. Robert Welch, Inc., supra* at 342. Plaintiff has failed as a matter of law to demonstrate any facts upon which a clear and convincing finding of "actual malice" can be predicated. Without such a finding plaintiff has no claim for damages and his action should be dismissed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Civil No. C 78-195

G. ANDREW LAWRENCE,

Plaintiff,

v.

FRANK E. MOSS,

Defendant.

[July 23, 1979]

SUMMARY JUDGMENT

The Motion for Summary Judgment filed by Defendant on November 13, 1978, having been heard and considered by the Court, and the Court having determined that there are no genuine issues of material fact in this case and having concluded, as a matter of law, that summary judgment should be entered for Defendant,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant have judgment herein and that Plaintiff's Complaint should be, and hereby is, dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant shall have his costs.

Santiago E. Campos
United States District Judge